United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

JAMES LEONARD BROWN,

Defendant-Appellant

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PETITION FOR REHEARING

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PETITION FOR A REHEARING

PRELIMINARY STATEMENT

Moving, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, appellant petitions this Court to grant him a rehearing from his conviction in the District Court. This petition is based upon the brief previously filed with this Court, along with appendix and the facts stated in this petition. The appellant asserts two grounds for granting a rehearing:

1. In denying appellant's appeal, this Court failed to understand that the extention of federal jurisdiction to cover this case would virtually abrogate the statutory requirement that the mails must be used in employing the scheme to defraud.

2. In denying appellant's appeal, this Court did not understand the prejudice inherent in permitting the trial court to inform the jury that non-appearing co-defendants had pleaded guilty.

ARGUMENT

I.

This Court did not understand that in ruling that the mailings of confirmations formed a sufficient basis for federal jurisdiction, it virtually eliminated the requirement that the mails be used in employing the scheme to defraud.

In reaching this conclusion, the Court held that MHTC and Gerald L. Smith had been defrauded. United States v. Brown, Slip Op. 3583, 3588 (2d Cir. May 16, 1977). However, the Court further held that the distribution of the securities was a necessary part of the scheme and that the mailings of confirmations of sale to Seed were a sufficient predicate for federal jurisdiction even though the mailings were incidental to the scheme to defraud.

It is clear that we are dealing with mailings that in no way touched upon or affected the defrauded parties. The confirmations were wholly unnecessary for the completion of the final sale. They were fortuitous and at best served only a book-keeping function. Furthermore, they differ from every prior case involving confirmations in that they were mailed to Seed and never seen by the defrauded parties.

The logical extention of this reasoning is the virtual abrogation of the statutory requirement that the mails be used in employing the scheme to defraud.

For example, consider the result had no confirmations been mailed in this case. Could federal jurisdiction be predicated upon confirmations mailed upon the resale of the AHPC stock by the investors who purchased it from Seed; or by the mailing of income tax returns of those investors accounting for capital gains or losses from the resale of the AHPC stock?

This Court's holding seems to embrace these fact patterns and almost any other, no matter how far removed from the fraud. Where is the line to be drawn? In our complex society there will always be some mailing incidental to a stock transaction if remoteness is not considered a limiting factor.

Failing to reach this issue abrogates the mailing requirements; a statutory amendment which should properly be left to the Congress.

II.

This Court did not fully appreciate the harm in permitting trial courts to comment on guilty pleas of co-defendants which were not in evidence before the jury.

In this case the trial court informed the jury that three defendants who had never been present before the jury, had pleaded guilty. This Court considered this claim of error to be frivilous.

However, an almost identical claim of error formed the basis for a reversal by the Fifth Circuit Court of Appeals in United States v. Hansen, 544 F.2d 778 (5th Cir. 1977). In Hansen the indictment charged Hansen and McGhee with four counts of possession with intent to distribute or distribution of a controlled substance. In addition, Hansen alone was charged with possession of a firearm during the commission of a felony.

McGhee pleaded guilty to the indictment. At trial, the Court instructed the jury panel as follows:

> For your information, I will advise you that the defendant, John Cameron McGhee has entered a plea of guilty. The fact that he has done so is in no way, manner or degree to affect your decision with respect to the guilt or innocence of the defendant who is on trial. I am telling you that so you will know why he isn't present in court. But you are not to consider that in any manner in passing upon the evidence in the guilt or innocence of this defendant.
>
> You undoubtedly will hear evidence which will mention him, but he is not on trial; and Mr. Hansen is the only person who is on trial.
>
> Id. at 779-80

The Fifth Circuit concluded that this was reversible error despite the fact that the disclosure was contained in a limiting instruction. "The prejudice to the remaining parties who are charged with complicity in the acts of the self-confessed guilty participant is obvious." Id. at 780.

The prejudice to appellant in this case (as developed in appellant's brief) is as severe as that found to exist in United States v. Hansen, supra, and should mandate a reversal of the conviction and granting a new trial.

CONCLUSION

For the reasons stated above, it is respectfully requested that this Court permit counsel an opportunity to reargue appellant's position concerning the merits of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MICHAEL B. POLLACK do hereby certify that on the 26th day of May, 1977, I caused to be served the attached Petition for a Rehearing upon Assistant U.S. Attorney Jacob Laufer, United States Attorney's Office, One St. Andrews Plaza, New York, New York, by Certified Mail, Return Receipt Requested.

Michael B. Pollack

MICHAEL B. POLLACK